

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

DAVID NELMS,

Petitioner,

v.

**WARDEN, NORTH CENTRAL
CORRECTIONAL COMPLEX,**

**Case No. 2:16-cv-0160
JUDGE GEORGE C. SMITH
Magistrate Judge King**

Respondent.

ORDER

This is an action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which Petitioner asserted three (3) challenges to his conviction, in the Delaware County Court of Common Pleas, on charges of engaging in a pattern of corrupt activity and possession of heroin. The Magistrate Judge recommended that Petitioner's first two claims be dismissed on the merits and that Petitioner's third claim, *i.e.*, ineffective assistance of counsel be dismissed as procedurally defaulted. *Report and Recommendation* (Doc. 19). That recommendation was originally adopted without objection, *see Order* (Doc. No. 20), but judgment was thereafter vacated because Petitioner established that he had timely objected to the recommendation.¹ *Order* (Doc. 23). Petitioner's objections were thereupon filed. *Objection* (Doc. 24). On June 29, 2017, however, the Court overruled Petitioner's objections, once again adopted the Magistrate Judge's recommendation, and dismissed the action.² *Opinion and Order* (Doc. 25). Final judgment was entered that same date. *Judgment* (Doc. 26). This matter is now before the Court on *Petitioner's Motion to Supplement his Objection to the Magistrate's [sic] Report and*

¹ Petitioner mailed his objections to the Magistrate Judge, but not to the Clerk.

² The Court also declined to issue a certificate of appealability. *Opinion and Order* (Doc. 25).

Recommendation and Motion to Respond to Court Order (Doc. 27) and *Petitioner's Motion to Reconsideration/Amend or Alter Judgement Pursuant Rule 59(e) [sic]* (Doc. 28).

In both of his motions, Petitioner appears to complain that the Magistrate Judge improperly addressed, *sua sponte*, the issue of procedural default. *See e.g., Petitioner's Motion to Reconsideration/Amend or Alter Judgement Pursuant Rule 59(e) [sic]* (Doc. 28, PageID# 626,27)(“Petitioner did not rec[eive] adequate notice from the Magistrate [sic] of the Supreme Court procedural default pursuant to Rule 4 thus denying him re[a]sonable opportunity to argue against the bar in violation of his 14[th] Amendment right”). However, the record is clear that Respondent raised, in the *Return of Writ* (Doc. 7), procedural default as a defense to Petitioner’s third claim for relief. *See Return of Writ* (Doc. 7, PageID# 51-54). Petitioner had the opportunity to respond – and in fact did respond, *see Petitioner's Traverse Brief* (Doc. 17) – to the *Return of Writ*. Thus, in recommending that Petitioner’s third claim for relief be dismissed as procedurally defaulted, the Magistrate Judge did not act *sua sponte* or raise an issue that had been otherwise waived by Respondent.

In short, nothing stated in Petitioner’s motions persuades this Court that final judgment was entered in error. *Petitioner's Motion to Supplement his Objection to the Magistrate's [sic] Report and Recommendation and Motion to Respond to Court Order* (Doc. 27) and *Petitioner's Motion to Reconsideration/Amend or Alter Judgement Pursuant Rule 59(e) [sic]* (Doc. 28) are therefore **DENIED**.

Moreover, and for the reasons previously stated by the Court, *see Opinion and Order* (Doc. 25) the Court **DECLINES** to issue a certificate of appealability.

s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT